

Court of Appeals, State of Michigan

ORDER

People of MI v Douglas M. Wrybkowski

Docket No. 283673

LC No. 07-001070-AR

Helene N. White
Presiding Judge

Michael J. Talbot

Karen M. Fort Hood
Judges

The Court orders that the motion to file a late answer is GRANTED.

In lieu of granting leave, the Court orders, pursuant to MCR 7.205(D)(2), that the order denying defendant's motions in limine and to dismiss is VACATED. The parties relied on *People v Berger*, 217 Mich App 213, 217-218; 551 NW2d 421 (1996), as the standard for admissibility of the Horizontal Gaze Nystagmus test, but the court abused its discretion by precluding defendant from presenting evidence that the test was not "properly performed," and inadmissible, and that the results of the Walk and Turn test, as performed by Deputy Allen, in light of the totality of circumstances, did not establish probable cause to arrest defendant. The matter is REMANDED to the trial court to allow defendant's proposed expert to testify at the evidentiary hearing on the motions. Because the Horizontal Gaze Nystagmus test is scientific evidence, *Berger, supra*, the court shall evaluate the admissibility of testimony concerning the testing pursuant to MRE 702, which incorporates the standard in *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993). See *Gilbert v Daimler Chrysler Corp*, 470 Mich 749, 781; 685 NW2d 391 (2004).

This order is to have immediate effect, MCR 7.215(F)(2).

The Court retains no further jurisdiction.



A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

AUG 05 2008

Date

Sandra Schultz Mengel
Chief Clerk